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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 824.

WASSILA KRESHIK, as Dean of Saint Nicholas Cathedral, and BORIS VIK, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as Exarch of the Patriarch of Moscow and all Russia, and DIMITRIUS JOHN DIACHENKO, as substitute for defendant, BORIS VIK, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church and as Exarch of the Patriarch of Moscow and All Russia,

Petitioners,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

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Those legal rights could not be annulled by later unilateral actions or pronouncements of the Patriarchate. In fact, the Patriarchate's actions after 1945 strengthened the plaintiff's right and also the Metropolitan District's right and need of administrative autonomy as a matter of self-preservation against involuntarily serving the purposes of an atheistic dictatorship actively hostile to the United States and to religion and seeking to extend its sway over the American Church, its properties and constituency 26

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SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

Summary of Argument.

The Respondent does not agree with the formulation or relevancy of "Questions Presented" on page 3 of the Petition or with the ensuing presentation of facts and law.

The Respondent respectfully submits that the Petition should be denied because:

(1) The decision of the New York Court of Appeals rests on an adequate non-federal basis. Rule 16(b) of the Rules of this Court. (*Board of the Black River Regulating District* v. *Adirondack League Club*, 351 U. S. 922.)

(2) The findings and determinations of the New York Court of Appeals as to local law and as to state issues are not reviewable by this Court. Moreover, they are substantiated by the record. (*Black* vs. *Cutter Laboratories*, 351 U. S. 292, 297-9; *Durley* vs. *Mayo*, 351 U. S. 277, 281, 285.)

(3) By Special Act of the New York Legislature in 1925 (ch. 463) the respondent, hereinafter referred to as the plaintiff, was incorporated as a body politic composed of Archbishop Platon and others of the Metropolitan District for the express "object and purpose" of "the acquiring, maintaining and management of a cathedral church" by this plaintiff.

Not until more than twenty years after the plaintiff had acquired the Cathedral and taken possession under this Act, and not until six months *after* this suit was begun, did the Moscow Patriarchal regime attempt to get or use the plaintiff's Cathedral. In holding that the Patriarchal regime could not then lawfully enter and take the possession of the Cathedral from the plaintiff, the New York Court of Appeals did not decide, and was not obliged to decide, an issue under the United States Constitution*.

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* Unless otherwise specified, all references to the record are to folio numbers. In Volume I the folio numbering begins with 1471, because the Record on Appeal to the Court of Appeals after the first trial is part of the record here (3406-9, 4453-4). To avoid confusion all exhibits at the second trial were followed in the marking thereof by the letter "D".

Since the Transcript of Record of the first trial, as filed with this Court on the first appeal, had no folio numbering, references thereto will be made by page numbers, preceded by the letters "U. S.".

POINT I.

The decision of the New York Court of Appeals is effectual and adequate on state grounds.

A.

Prior judicial recognition of issues adequate for decision on state grounds.

In its first decision (302 N. Y. 1 [1950]) the New York Court of Appeals ruled (pp. 22-4) that there were two distinct issues,—namely, a common law issue and a statutory issue. It held that, because the former had not been sufficiently developed at the trial, a new trial would have been needed thereon, but that, because of the statute (N. Y. Religious Corporations Law, Article 5-C), a final judgment in the plaintiff's favor should be rendered without further trial.

In its amended remittitur the Court of Appeals certified that the constitutionality of Article 5-C under the United States Constitution had been "necessarily passed upon" (302 N. Y. 689 [1951]).

Thereupon the case came before this Court on appeal. After argument, this Court ordered reargument and requested counsel, "in view of the opinion, concurring opinion, dissent, judgment and remittitur of the Court of Appeals of New York concerning the status of the Patriarchate in Russia", "to include in their presentation a discussion of whether the judgment may be sustained on state grounds" (343 U. S. 972 [1952]). Both counsel then conceded that, in view of the Court of Appeals' amended remittitur, that Court's direction of final judgment for the plaintiff had necessarily involved the constitutionality of Article 5-C (344 U. S. 94, 97).

In its opinion of reversal on the merits of this constitutional issue (344 U. S. 94 [1952], Mr. Justice Jackson dissenting), this Court nevertheless noted (p. 106) that the Court of Appeals had "concluded that this (the state law) aspect of the controversy had not been sufficiently developed to justify a judgment upon that ground". The remand by this Court was "for such further action as it (the New York Court of Appeals) deems proper and not in contravention of this opinion" (p. 121).

In its second decision, rendered after the remand (306 N. Y. 38 [1953]), the Court of Appeals held that this Court's decision had not dealt with or concluded the common law or state grounds, but had merely reversed the determination that Article 5-C was constitutional and hence effective for immediate final judgment for the plaintiff (pp. 45-49).

In consequence, the Court of Appeals ordered a new and full trial of the common law issue in order that there be built up "a record which is suitable for intelligent review and adjudication by the appellate courts" (p. 53).

The defendants thereupon petitioned this Court for a mandamus directing dismissal of the complaint. The ground alleged was that this Court's decision had concluded all issues. The petition was denied (*sub nom., Ex Parte Kedroff*, 346 U. S. 893 [1953]).

The common law or state grounds were thereupon tried at great length and now have been decided in this third decision by the Court of Appeals (7 N Y 2d 191 [1959]).

The plaintiff submitted a vast body of new oral and documentary evidence not in the previous record.

B.

The plaintiff's ownership, right of possession and management, and its occupancy, of the Cathedral as real property governed by New York law.

(1) In its decision (7 N Y 2d 191) the Court of Appeals makes clear that it does not question the right of the Patriarch of Moscow "to minister to those in this country who may still acknowledge the administrative rule of the Patriarch of Moscow", or to appoint clergy and establish churches for such ministry (p. 218).

The decision does not purport to prescribe what beliefs or forms of worship shall be orthodox, or what religious, missionary or propaganda enterprises the Moscow Patriarch may undertake in the State of New York or elsewhere.

The decision merely determines the rights of the plaintiff corporation as the holder of the title to and the right to possession and management of the particular property known as St. Nicholas Cathedral.

Concerning the plaintiff the Trial Court has expressly concluded (1591):

> "5. The trustees of the plaintiff corporation are now members of the North American Metropolitan District."
>
> 6. The plaintiff corporation is the present owner of record title to St. Nicholas Cathedral and is entitled to possession thereof."

These statements reproduced like explicit findings in 302 N. Y. 1, 20, and 306 N. Y. 38, 51-2.

A Metropolitanate or Metropolitan District is a large ecclesiastical district composed of dioceses and ruled by an Archbishop with the title of Metropolitan (U. S. p. 29).

In 1922 Archbishop Platon Rozdestvensky was "Metropolitan" of the Metropolitan District of the Russian Orthodox Church in America (4106-10).

(2) Immediately following the American Metropolitanate's declaration of administrative autonomy at its Detroit sobor in 1924 pursuant to Patriarch Tikhon's Ukase of 1920 and the necessity for self-preservation (pp. 8 *et seq., post*), the plaintiff was incorporated by Special Act of the New York Legislature in 1925 (L. 1925, Ch. 463, Ex. 1, U. S. p. 169, effective April 8). The Act named as the body politic Archbishop Platon Rozdestvensky and others "and their successors", incorporated for "the acquiring, maintaining *and management* of a cathedral church". (Emphasis ours.)

Archbishop Platon was named in the Act "the official head" of the plaintiff; and by the Act the plaintiff was authorized to acquire and own real and personal property, including the real and personal property of "St. Nicholas Church". The plaintiff was to have "perpetual succession", and the right to establish its own constitution and "to enact statutes or by-laws" "for the government, regulation and management" of itself, "its officers, business, property and affairs".

Platon was then the ruling Archbishop ("Metropolitan"), having been so appointed by oral and written appointment of Patriarch Tikhon in 1922 and 1923, and having been so recognized by the American sobors of 1922 and 1924 (Findings of the Trial Court, 46, 47, 48, 49, 51; fols. 1562-6).

Pursuant to the Special Act and by ordinary warranty deed dated April 17, 1925 and duly recorded, "St. Nicholas Church" in New York conveyed all its property outright to the plaintiff, "its successors and assigns forever" (U. S. p. 204; Ex. 11).

There followed on April 23, 1925, the first meeting of the Trustees of the plaintiff named in the Act as "the first trustees". The meeting was held *in "the Rectory of the St. Nicholas Cathedral,* 15 East 97th Street, City of New York" (U. S., p. 171).

The minutes of this first meeting appear in U. S. p. 171-4. They show that there presided "Metropolitan Platon Rozdestvensky" as president of the plaintiff; and that he opened the meeting with a statement of "the reasons and purposes of the incorporation of the St. Nicholas Cathedral", and of "his profound satisfaction that the Cathedral thereby will forever be preserved safe as a central place of worship of the whole Russian Orthodox Church in North America". (U. S., p. 171.)

The minutes further recited (U. S., p. 172) that the Board of Trustees thereupon adopted a "Constitution"; and that the Board determined that the statutes (by-laws) of the plaintiff "shall provide that the Ruling Archbishop of the Russian Orthodox Church in North America, who at this time is His Eminence Metropolitan Platon, duly appointed to this office by His Holiness, the late Patriarch Tikhon" (U. S., p. 174),

> *"shall have the right to nominate the dean and other clergy and servants of the Cathedral;* and use the Cathedral at his discretion for all Episcopal acts and for other religious, benevolent and educational purposes, and have the general and unrestricted direction of the religious services in the Cathedral, and to use the building known as the rectory adjoining the Cathedral as his personal residence, and that it shall be lawful for the Archbishop through the Dean of the Cathedral, or any other person to be designated by him, to organize a parish at the Cathedral consisting of the Communicants worshipping at the Cathedral Church". (Emphasis ours.)

Since its 1925 incorporation the plaintiff has been and still is composed of and controlled by the constituted Archbishop and others of the North American Metropolitanate (Metropolitan District) of the Russian Orthodox Church (306 N. Y. 38, 44; Conclusions of the Trial Court, fol. 1591).

C.

The events which forced the American Church in 1924 to declare administrative autonomy for self-preservation and for protection against the Communist Dictatorship.

(1) This incorporation of the plaintiff immediately followed the critical year 1924, when the Revolutionary Bolshevik Government, by persecution of Christianity far worse than in the days of the Caesars and by setting up a disruptive puppet sobor had nearly completed destruction of the Orthodox Church in Russia, had dropped an Iron Curtain athwart its communication with the outside world, and was reaching for the control of the American Church and its properties.

In order to survive as a religious body the American Church, while continuing to "partake of the doctrine, creed and spiritual heritage of the Russian Orthodox Church" (7 N Y 2d 191, 197), had been forced in 1924 under the leadership of Archbishop Platon to adopt *administrative autonomy*, in the exercise of its inherent right of self-preservation and pursuant to a Ukase promulgated by Patriarch Tikhon in 1920 to provide for just such necessity. [See pp. 9-13, *post*.]

(2) In Russia Tikhon had become Patriarch in 1917. He died in 1925, old, ill, imprisoned and broken by the Communist Dictatorship, which put him on trial for his life before its criminal tribunal (1808, 4120-4; Ex. 2-D, pp. 37-9).

The history of the tragic years from 1917 to 1925 is recounted as follows by the Court of Appeals (1 N Y 2d 191, 198):

> "Upon the occurrence of a vacancy (in the American Archbishopric), Patriarch Tikhon appointed one Archbishop Platon as head of the North American Diocese. The appointment was made verbally at first, in view of the difficulty in transmitting such a communication out of Russia, but later, in September, 1923, it was confirmed in writing. At that time, the persecution of the church in Russia by the Soviet Government was at its peak of violence and virulence. The Communists, of course, were militant atheists committed to the doctrine that religion is the opiate of the people. Moreover, many of the ruling clergy, having held positions of importance under the Czar, were obviously counterrevolutionary in outlook and belief. The Soviet Government, therefore, attacked the church with every means available, both directly, through confiscations, arrests, imprisonments, exiles and executions and, indirectly, through cultivation and support of divisive and dissident elements within the church. *As a result, by this time, the activity and authority of the Patriarch in Moscow had virtually ceased to exist.*" (Emphasis ours.)

(3) In 1920, at the height of the persecution and foreseeing that he might soon be cut off from functioning, Patriarch Tikhon issued his aforesaid Ukase No. 362 of November 7, 1920 (Ex. 4-D, fol. 4913), instructing all Diocesan Bishops in Russia and abroad that "for the case that a given Diocese be severed from the highest Church Administration, or in case the latter's activity stop", the Diocesan Bishop should "assume the full hierarchal power" and "do everything possible to regulate the local church life, *and if necessary* * * * *organize the diocesan administration suit-*

able to conditions created". Other paragraphs provided for the continuation of such local administration of the church if the discontinuance of activity of the highest church administration "*should acquire a protracted or even permanent character*". All such local measures should be submitted for confirmation later to the Central Church Authority "when it is re-established". (Ex. 4-D, fol. 4913; 302 N. Y. 1, 7; 344 U. S. 94, 103.) (Emphasis ours.)

This Ukase has been described by this Court as "relating to church administration for troublesome times", and as having "granted a large measure of autonomy" (344 U. S. 94, 103).

"During the imprisonment of the Patriarch, the substance of this Ukase was repeated in a circular letter sent to all dioceses on behalf of the Patriarch in 1922" (7 N Y 2d 191, 199; Ex. 5-D, fol. 4925).

The foresight of Patriarch Tikhon proved accurate. In the spring of 1922 he was imprisoned; and in 1923 he was declared, at a "Holy Sobor of the Orthodox Church" organized in Russia under the overlordship of the Soviet Government, and proclaiming "capitalism to be a mortal sin", to be "an apostate" and "traitor", and unfrocked (Ex's 7-D and 8-D; fols. 4927, 4930-2, 4935-6). [See pp. 13-16, *post*.]

On accusations by the Soviet Government he was also put on trial for his life before the Soviet Tribunal in Moscow (4121-4).

Thereafter the election of a new Patriarch was not permitted for twenty years, viz: until 1943. (302 N. Y. 1, 7, 8, 17; fols. 1887-90.)

(4) For the North American Diocese the causes and the consequences of this double disruption of the Church in Russia threatened chaos and catastrophe. To quote the Court of Appeals (7 N Y 2d 191, 198-9):

> "The North American Diocese, clergy and faithful, were bewildered and confused at the inconsistent and improbable reports and orders emanating from Moscow. For example, only five months after his appointment by Patriarch Tikhon, a document appeared here purporting to have been issued by Tikhon which dismissed Platon as archbishop for engaging in counter-revolutionary 'acts * * * directed against the Soviet.' There remains grave doubt as to whether the Patriarch really issued such a document, at least as his own voluntary act. In any event, it had become clear to the North American Diocese that the Patriarch and the church administration in Moscow were no longer in effective control of the church. In addition, as we shall see, imposters were appearing in this country seeking to seize control of the administration of the Diocese, and all its properties and temporalities."

In addition also, aged Patriarch Tikhon was known to be "very seriously sick", and in the keeping of the Soviet Government (4140-2; U. S. pp. 181-2).

Hence, in order to preserve from disaster his religious community in America, Archbishop Platon, acting under the inherent right of the American Church to preserve itself and under Tikhon's Ukase of 1920, called a sobor (convention) of the North American Diocese at Detroit in April 1924 (4137-4143; 7 N Y 2d 191, 199, 200).

Concerning the imperative for this American sobor and its action, the Court of Appeals has found and determined (7 N Y 2d 191, 205):

> "It seemed clear on the earlier record, and it is now beyond doubt, that the 'general' or central authority of this church, the Moscow Patriarchate, persecuted as it was by the Communists, had ceased to exist as an operative and functioning entity by

> 1924 when the Detroit sobor of the North American Diocese declared its autonomy and assumed the right of local election of its archbishop."

Moreover, quite aside from the authority granted by the Ukase of 1920, there was, as found and determined by the Court of Appeals, 7 N Y 2d 191, 205-6:

> "* * * inherent power in the leaders and faithful of the North American Diocese to protect their property and temporalities against diversion and dissipation by hostile elements operating independently or through the mechanism of a captive Patriarchate. * * * they prudently did not delay action until they were divested of all their property."

(5) Concerning events in America from 1922 to this Detroit sobor in 1924, the Trial Court found (1562-4) that by his aforesaid appointment by Patriarch Tikhon, Archbishop Platon "became the true head of the North American Diocese" (1562-4); that the diocesan sobor in Pittsburgh in 1922 had acknowledged Platon as the ruling Archbishop of the North American Diocese (1562); and that (1562; Finding 47):

> "Platon accordingly took possession of St. Nicholas Cathedral and exercised administrative supervision over the diocese."

The action of the 1924 Detroit sobor was thus described by the Trial Court in its Finding 51 (1565):

> "51. The American sobor held in Detroit further resolved, in view of the Communist persecution and subjection of the Church in Russia, to create its own 'administration, completely insured against possibility of the direct or indirect influence of the Soviet power.'"

For like reasons, when in the fifteenth century the Ecumenical Patriarchate of Constantinople fell under the overlordship of the "infidels" (the Turks), the Russian Orthodox Church established its administrative autocephaly, but without doctrinal schism (4190-4202; opinion of Judge Van Voorhis in this case, 276 App. Div. 309, 341-2).

D.

The 1926 seizure of the Cathedral by the Communist Dictatorship through its Russian creature, the "Holy Sobor of 1923 of the Russian Orthodox Church", and its appointee John Kedrovsky.

(1) The Communist Government reinforced its direct attacks on the Orthodox Church by the familiar device of internal disruption through using its totalitarian powers to set up within the Orthodox Church an organization claiming its voice and authority. To quote Findings 54 and 55 by the Trial Court (1568-9):

> "54. In 1923, a pseudo-sobor was held in Moscow under the overlordship of the Bolshevik Government."
>
> 55. This pseudo-sobor, aided and abetted by the Russian Government, created the 'Living Church' or 'Renovated Church' which is now conceded to have been schismatic and uncanonical and which became extinct a few years later. It denounced Tikhon as an apostate and traitor, and purported to unfrock him."

This sobor called itself "the Holy Sobor of the Russian Orthodox Church" and opened with obsequious laudation of "the world-leader, V. I. Lenin", with whom "every honorable Christian should take his place" (Ex. 7-D, 4927). After declaring that "hereafter Patriarch

Tikhon is Layman Basil Belanin", it proclaimed in the name of the Orthodox Church that (Ex. 8-D, 4932, 4936, 4940):

> "The Holy Sobor hereby abolishes the restored patriarchate; hereafter the church shall be governed by the Sobor."

The Moscow Dictatorship immediately used this ecclesiastical puppet to attempt to seize the properties and pulpits of the Orthodox Church in America and elsewhere abroad by representing this "Holy Sobor" of 1923 as the true voice and authority of the Russian Orthodox Church.

To this end it caused this "Holy Sobor" in 1923 to excommunicate Archbishop Platon and to endow an ecclesiastical Quisling, one John S. Kedrovsky, with the title of ruling Archbishop of the entire Church and its properties and pulpits in America (4131-2; 302 N. Y. 1, 10; 7 N Y 2d 191, 202).

Kedrovsky instituted in the Supreme Court of New York two suits against Archbishop Platon and his administration,—one to seize the Cathedral and the other to seize the properties and pulpits of the Church in America (302 N. Y. 1, 10, 11).

Kedrovsky's Cathedral action was begun in March 1924, one month *before* the aforesaid sobor in Detroit and immediately following the circulation in the press of this country of a document, dated February 1924, purporting to have been signed by Patriarch Tikhon and to dismiss Archbishop Platon, without notice or trial, on the charge of engaging "in public acts of Counter-Revolution directed against the Soviet power and of disastrous consequence to the Orthodox Church" (302 N. Y. 1, 11). The charge was the equivalent of a charge of treason against the Soviet Government,—committed in America!

Doubtless Archbishop Platon's "public acts of Counter-Revolution directed against the Soviet power" were his actions in calling the Detroit Sobor for April, 1924 in order to save the American Church from becoming the captive and tool of "the Soviet Power" and from seizure by Kedrovsky as that Power's agent. (7 N Y 2d 191, 199.)

(2) Kedrovsky's Cathedral action terminated in 1926 in a decision by the Court of Appeals (242 N. Y. 547 [1926]) which ousted Archbishop Platon and brought about occupancy of the Cathedral by Kedrovsky and his sons after him *for twenty years until October 1945, six months after the present suit began.* By that decision and judgment Archbishop Platon and his associates and successors were permanently *enjoined* from interfering with Kedrovsky's occupancy (U. S., pp. 23, 24).

That decision in 1926 has since been thrice repudiated by the Court of Appeals (302 N. Y. 1, 12, 13; 306 N. Y. 38, 42; 7 N Y 2d 191, 202) as made in ignorance of the true facts about the aforesaid Russian "Holy Sobor" of 1923 and as in effect delivering the Cathedral to the Soviet Government, but with the result (306 N. Y. 38, 42):

> "it is now apparent that, by virtue of that decision, the rightful occupant was ousted from the Cathedral and its administration and possession turned over to a schismatic."

As a corollary, the Court of Appeals held it is also "now apparent" that, when the present suit was begun, the plaintiff with Archbishop Theophilus (successor to Platon deceased) as its "official head", and not John Kedroff (Kedrovsky's second son and then the sole defendant), was the "rightful occupant", and that Kedroff, who claimed to be a priest of the "Renovated Church", "could not put in any defense" (306 N. Y. 38, 44, 45; 7 N Y 2d 191, 203).

While the Kedrovsky suits were in progress, "the Soviet sponsored 'Renovated Church' was the only one permitted to function in Russia, the central office of the patriarchal church being suppressed by the Government" (302 N. Y. 1, 14, 15).

(3) Archbishop Platon died in 1934, and was succeeded as Metropolitan by Archbishop Theophilus, an American citizen (3349, 4117, 4150). Theophilus died in 1950 and was succeeded by Archbishop Leonty, the present Metropolitan and also an American citizen, through election at successive American sobors (302 N. Y. 1, 16; 306 N. Y. 38, 44)

E.

Throughout the twenty years from 1926 during which the Communist Dictatorship held possession of the Cathedral through its puppets Kedrovsky and his sons, the Patriarchal regime in Moscow did not claim the Cathedral or attempt to get into it.

No fact could be more probative of the absence throughout that period of any right in the Moscow Patriarchal regime (such as it was) to the Cathedral or of any belief in such a right.

In fact, from the aforesaid Detroit sobor of 1924 and the incorporation of this plaintiff in 1925, no ecclesiastic of the Moscow Patriarchal regime was in the Cathedral at all, until six months after the present suit began in April, 1945.

This is the more significant because one Sergius, who had proved his pliability by having joined the Living Church (2191, 4125-6; Ex. 2-D, p. 57) and who in 1933 had been allowed by the Dictatorship to assume in Moscow the title of "Acting Locum Tenens" of the Patriarchate on pledging the loyalty of the Church at home and abroad, had in 1933 dispatched Benjamin (Fedchenkoff) to organ-

ize a Patriarchal regime in America, to excommunicate Archbishop Platon and all clergy and laymen who followed him, until they submitted themselves to the jurisdiction of Sergius, and to demand from all clergy and parishes in America written pledges of "complete loyalty to the Soviet Power" on pain of excommunication (302 N. Y. 1, 15; 7 N Y 2d 191, 200; and pp. 19-22, *post*).

When the pledge was refused by the American clergy, Sergius "laid a suspension upon the American Church." "It was this act of suspension which broke off spiritual relationship between the two churches" (Ex. 60-D, 5626, 5634-5, 5667-8).

The events of the following year (1934) have been thus found and stated by the Court of Appeals (302 N. Y. 1, 15, 16):

> "Finally in 1934, Sergius appointed his ambassador Benjamin, as 'permanent Ruling Bishop of the Russian North American Diocese'. The text of the order contains a recital that Benjamin had 'organized in New York a Diocesan Council and that our *North American Diocese has begun official existence.*' (Emphasis supplied.) This would appear to be a significant admission that the former North American Diocese, which had by that time become a metropolitan district, had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese. By 1945, the number of parishes which recognized the new diocese set up by Benjamin in 1934, and which we must assume, in view of the provisions of the Religious Corporations Law since 1875, were organized for the purpose of adhering to such new diocese set up by Benjamin, was only 13, while those adhering to the autonomous metropolitan district were said to total 358." (See also fols. 5650-2.)

For twelve years after his arrival Benjamin made no effort to take possession of the Cathedral or to include it in the new diocese which he had thus "organized."

The Court of Appeals has said that this "conduct may be said to constitute a practical interpretation of his authority as contained in his appointment in forming a new or different diocesan council and North American Diocese" (306 N. Y. 38, 45).

F.

The New York judicial history culminating in the present suit begun on April 9, 1945.

(1) As already stated, on March 20, 1926, the Court of Appeals rendered the decision (242 N.Y. 547), now admittedly mistaken, which had the effect of enjoining and ousting from the Cathedral Archbishop Platon Rozdestvensky and of installing Kedrovsky, the aforesaid representative of the Renovated Church and the Soviet Power (7 N Y 2d 191, 202).

Emboldened by this decision Kedrovsky pressed his other suit for control as "Archbishop" of the properties of the American Church and for the ouster of Archbishop Platon therefrom. He was successful in the lower courts which relied on 242 N.Y. 547; but on July 19, 1928, the Court of Appeals, becoming doubtful that the realities had been fully revealed, unanimously reversed (249 N.Y. 75, 516), and ordered a new trial for further investigation and consideration.

The Court of Appeals has itself said that this latter decision was rendered because of (306 N. Y. 38, 43):

> "Realizing that the legitimate claims of the new metropolitan district, whose temporary administrative autonomy had but recently been declared, were entitled to consideration, * * *"

(2) Then in 1940 the autonomous rights and status of the Metropolitanate came squarely before the Court of Appeals in *Waipa* v. *Kushwara*, 259 App. Div. 843, leave to appeal denied 283 N. Y. 780.

That was a suit wherein clashed through the contending parties the authority of Archbishop Theophilus (the aforesaid successor of Platon deceased) and of Benjamin Fedchenkoff theretofore designated (as aforesaid) as ruling Archbishop for America by the Moscow Patriarchal regime.

The complaint pleaded the validity of Tikhon's Ukase of 1920 and the administrative autonomy declared by the American sobors in 1924 and thereafter. The defense pleaded the overlordship of Benjamin as Patriarchal appointee. (See the *Waipa* Rec. on App.)

This *Waipa* case presents unanimous judicial confirmations without opinion of the decision of Hon. J. Addison Young, Official Referee, reported at length in the New York Law Journal of January 6, 1940, p. 97, col. 5, and fully upholding the authority of Archbishop Theophilus over the American Church. The reasons are manifested in the following extract (highly pertinent to the present case) from Referee Young's realistic opinion:

> "Patriarch Tikhon died in prison on April 7, 1925. Only a General Church Sobor could elect Tikhon's successor and the Soviet Government has not permitted the convocation of such a Sobor. Apparently for the purpose of seizing church property, the Russian Government appointed one Sergius as Metropolitan of the church as successor of Tikhon and ordered that all the clergy of the Russian Church throughout the world should sign a pledge of loyalty to the Soviet Government, and, for failure to do so, they were to be outlawed. Of course, the clergy of the church in America refused to sign any such pledge, and thereupon the Soviet Government

> directed Sergius to appoint one Benjamin as Metropolitan of the church in America, with directions that he take over the church properties in America for the benefit of the Soviet Government. Benjamin came to America in 1933 and immediately sent out notices to the clergy to sign a pledge of loyalty to the Soviet Government on pain of punishment of not being considered a part of the Russian church."

Of this *Waipa* decision, the Court of Appeals said in 302 N. Y. 1, 16:

> "In 1940, the status of the metropolitinate again came before this court in *Waipa* v. *Kushwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780). That was a suit to oust a priest from a Russian Orthodox Church in Yonkers, N. Y. He had been suspended by Archbishop Theophilus of the metropolitan district and in the civil action brought against him, he defended on the ground, among others, that Benjamin, the appointee of the Moscow Patriarchate and not Archbishop Theophilus, the elected metropolitan, had the power and authority to administer the affairs of the church here. The lower courts rejected that contention, finding authority for the creation of the administrative autonomous metropolitan district in the ukase of 1920 of Patriarch Tikhon which was to continue 'until such time as the existing civil authorities • • • would cease interfering with the church.' (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5.) We denied leave to appeal."

And of the same *Waipa* decision the Court of Appeals said in 306 N. Y. 38, 44:

> "Finally, the autonomous status of the metropolitan district, based upon the above-described

ukase of 1920, was expressly sustained in *Waipa* v. *Kyshwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780)."

(3) The facts thus found and adjudicated in the *Waipa* case meant that the atheist Soviet Government, from the time of its imprisonment of Patriarch Tikhon in 1922, was determined, not only through its puppet the Renovated Church but also by exacting "pledges of loyalty" to itself, to reach into the United States and to subvert the Orthodox Church, its pulpits and its properties in America into "*an establishment of religion*" *controlled by itself.*

Thus on June 16, 1927, under compulsion of the Dictatorship and successive imprisonments, Sergius had issued the following ultimatum to the clergy abroad (1820; Ex. 10-D, 4970):

> "In order to put an end to this state of affairs, we demanded from the clergy abroad a written promise of their complete loyalty to the Soviet government in all their public activities. Those who fail to make such a promise, or to observe it, shall be expelled from the ranks of the clergy subject to the Moscow patriarchate."

At the first trial of this suit, Benjamin, who in 1933 had been appointed as aforesaid by Sergius to be "Exarch in America", testified (3286):

> "Q. You advised the present Patriarch [Alexy] just prior to his election [in 1945] that an essential condition of reunion between the Mother Church and the American Church was the fullest loyalty to the Soviet power, did you not? A. (In English). Yes."

On July 12, 1944, as found by the Trial Court herein, the following occurred (1578):

"66. On July 12, 1944, Alexy, while still *locum tenens*, advised Benjamin (Fedchenkoff) concerning a possible rapprochement with the Metropolitan District that there was one 'condition which *must* be presented to them, namely the demand of the fullest loyalty, that is, complete abstention from attacks on the Soviet Power is not a political, but an *ecclesiastical* condition.' " (Emphasis is Alexy's.)

(4) Thereafter a sobor in Moscow in January 1945 elected Alexy as Patriarch.

The American Metropolitan District had been recognized to the extent of a short-notice invitation to send delegates; but the delegates chosen were detained in Siberia as described in 302 N. Y. 1, 17, until the sobor had concluded and dispersed. (Ex. 60-D; 5639-42.)

Thereafter Alexy gave to the American delegates a decree dated February 16, 1945, imposing numerous "conditions" for "reunion", among which were conditions which would insure the deposing of Archbishop Theophilus and the conditions quoted in Findings 67 and 68 by the Trial Court (1579; Ex. 13-D, fols. 4996-5003; 7 N Y 2d 191, 201-2):

"67. By his ukase of February 16, 1945, Alexy, by then the newly elected Patriarch, required as a condition of such a rapprochement that a Sobor of the American Church 'declares its abstention from political activities against the U. S. S. R. and gives corresponding order to all parishes.' "

"68. Churches and Clergy under the jurisdiction of the Moscow Patriarchate *are still required to* abstain from using their church offices and pulpits for any political activity and in particular, any political activity directed against the country of Russia or the Government of Russia." (Emphasis ours.)

(5) These and the other "conditions" imposed by Alexy were pronounced unacceptable by the North American Metropolitan District, for the reasons set forth in the report of the American Metropolitan District to its constituency (Ex. 60-D, 5626) and summarized in the following footnote on pages 18 and 19 of 302 N. Y. 1, 18:

> "It was pointed out, however, that the text of the ukase disclosed that the Moscow Patriarchate had 'little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed.' Then followed a point-by-point analysis of the ukase. One of the major obstacles was the insistence of the patriarchy upon renunciation of political activities against the U. S. S. R. The report said: 'It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase.' Another stumbling block was the vagueness of the ukase as to the powers of the North American church. It was felt that 'the precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime.'"

(6) These successive events led to the institution of the present suit on April 9, 1945, by this plaintiff as a corporation of the Metropolitan District and as the holder of the title to and the right to possession and management of the Cathedral. [See pp. 5-8, *supra*.]

One object of the suit was, in view of the *Waipa* decision, pp. 19-21, *supra*, to undo the aforesaid admitted error of the 1926 decision and injunction in 242 N. Y. 547, resulting from the then successful concealment by the Soviet Power of the true facts about the aforesaid "Holy Sobor" of 1923. [See pp. 15, 16, *supra*.]

Kedroff, the sole defendant and occupant, had no defense. [See pp. 15, 16, *supra*.]

Six months later there was a deft ecclesiastical maneuver. Kedroff suddenly arranged with Benjamin for an ordination. On receiving it he "purported to 'give' the Cathedral to Benjamin" as representative of the Patriarchate (306 N. Y. 38, 45), with the result (p. 45):

> "Benjamin then occupied the cathedral from October, 1945, until June 6, 1947, when, in order to obtain an adjournment of this action, *he agreed to give up possession of the cathedral* (302 N. Y., at p. 21). At the time of trial, Benjamin was living at 38 Halsey Street in Brooklyn." (Emphasis is the Court's.)

G.

Thus this suit came as an ejectment action brought under New York State law and concerning local real estate in that State.

By reason of the foregoing, when this suit was begun in April, 1945, the Cathedral was the lawful property of the plaintiff corporation, with lawful right to its possession, management and occupancy; and the sole occupant and defendant Kedroff had no right to it at all.

Neither at that time, nor at any time during the more than twenty years following the establishment of *administrative* autonomy by the Detroit sobor of April, 1924, had

the Moscow Patriarchal regime (such as it was) had any occupancy of the Cathedral or even attempted to obtain it.

By this suit the plaintiff was asserting local rights under local law.

Before there can be reached a question as to whether a state has interfered with the free exercise of religion, the party alleging the interference must first establish his superior right under state law governing the real estate involved to exercise the freedom to the exclusion of the owner of the title and right of possession.

The right to title, possession and management which the plaintiff had permanently acquired in 1925, could not thereafter be divested and replaced against the plaintiff's will by any *unilateral* act or pronouncement by some outside person,—much less by a foreign ecclesiastical regime "exploited as a tool by" a foreign atheistic state actively hostile to the United States, its constitutional principles and its people, and seeking to secure for its own ends a sway over the property, pulpits and constituency of the American Church. [See Point II, p. 26, *post*.]

Any claim to a power and right to effectuate unilaterally and by *ipse dixit* such a divestiture and replacement necessarily tendered a local issue as to local property to be determined judicially, and now determined judicially, under the state law of New York.

Throughout, the American clergy and laity had, "with trifling exceptions", "remained loyal to the duly elected Metropolitan" (5636).

The following carries the narrative forward from 1945.

POINT II.

For the reasons stated in Point I the Court of Appeals held as a matter of state law that this suit was based on the legal and vested rights of the plaintiff and of Archbishop Platon and his successors as its body politic to the title, possession, management and occupancy of the Cathedral.

Those legal rights could not be annulled by later unilateral actions or pronouncements of the Patriarchate. In fact, the Patriarchate's actions after 1945 strengthened the plaintiff's right and also the Metropolitan District's right and need of administrative autonomy as a matter of self-preservation against involuntarily serving the purposes of an atheistic dictatorship actively hostile to the United States and to religion and seeking to extend its sway over the American Church, its properties and constituency.

(1) The history of the Patriarchate after 1945 as "a tool exploited by" the Communist Dictatorship for communizing and controlling the world, subverting the United States, and dominating the properties, pulpits and constituency of the Orthodox Church in America, is told in 7 N Y 2d 191.

Indeed, the opinion of the Trial Court itself acknowledged that the proof showed "the Russian Church as a tool exploited by the state" (6374); and the dissenting opinion in the Court of Appeals closed with acknowledging "a case where a Communist-oriented or Communist-dominated Patriarch appoints a Communist sympathizer as archbishop" (7 N Y 2d 191, 221). Commenting on this acknowledgment, the majority opinion in the Court of Appeals said (7 N Y 2d 191, 215):

> "No other view is possible than that the Russian church is administered as an agency of the Soviet State and we are sure that even our dissenting brethren will agree that no court which sits in judgment on this case can be so naive as to disbelieve, any more than did the trial court, by its own statements, the strong proof that the Patriarch is subservient to the Communist dictatorship in the U. S. S. R. * * * The present Soviet Government is frankly and grossly anti-religious. It attempted to destroy the church and only tolerates it now because it can be useful."

(2) But this subservience "as a tool" was and is much more than mere passivity,—much more even than refraining from the first duty of a Christian Church to denounce Atheism, state-sponsored war upon religion, governmental extermination of freedom, and organized denial of the personal rights composing the dignity of the individual man.

It is not conceivable that any Christian community in the United States could ever associate itself with such refraining and yet feel entitled to call itself Christian.

But the proof and the findings show that since 1924 the Moscow Patriarchal regime has continuously been, in the hands of the Communist Dictatorship, not only "a tool" but *a weapon*,—"an important propaganda weapon for the Soviet government" (3603) against the United States and the Free World and for the bringing of the properties, pulpits and constituency of the American Church into service to the Communist Power.

The Court of Appeals has expressly so found and declared (7 N Y 2d 191, 210, *et seq.*). Communist Totalitarianism, reaching for the world, brooks no slackers.

In its opinion in 1952 this Supreme Court itself recognized that, even at the time of the 1924 Detroit sobor, there already were a "growing number of American-born members of the Russian Church" (344 U. S. 94, 103).

Hence the focus of this case is not on Russian but on *American* citizens, properties, pulpits and temporalities and their administration.

(3) The Trial Court expressly found, in the language of the National Security Act (50 U. S. C. A. §§ 781 (1), 811(1), that (1519)):

> "1. There exists a world Communist movement which, in its origins, its development, and its present practices, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

The National Security Act also records the following findings of fact by Congress in subdivision (2) of the aforesaid sections:

> "2. The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, *such as freedom of speech, of the press, of assembly, and of religious worship*, and results in the maintenance of control over the people through fear, terrorism, and brutality." (Emphasis ours.)

Indeed, this Court itself has held in *Barenblatt* v. *United States*, 360 U. S. 109, 127-9, that these congressional findings and congressional legislation and investigations directed against these hostile activities "rest(s) on the right of self-preservation", "the ultimate value of any society",—these

words being reproduced from *Dennis* v. *United States*, 341 U. S. 494, 509, and also from *Uphaus* v. *Wyman*, 360 U. S. 72, 80, which latter case upheld just such a right by New Hampshire to preserve itself against this world-wide Communist conspiracy. Moreover, in the *Barenblatt* case, this Court rejected the right of anyone (p. 129):

> "to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in *United States* v. *Dennis*, 183 F. 2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation."

For the same reasons, the Russian Orthodox Church in America and its American-born constituency had and has the same "right of self-preservation", "the ultimate value of any society",—to preserve its administration and its pulpits, properties and integrity from use or influence, direct or indirect, by this actively hostile and atheistic world movement, and from being sucked into furtherance of or alliance with its objectives and doctrines.

Its American clergy and people could not and would not acquiesce in becoming administratively part of an "*establishment of religion*" in America dominated by or subservient to an atheistic foreign state and its communist dogmas, or used by it openly or covertly to further that state's hostile purposes against the United States, its people and its security. (Ex. 60-D; 5626, 5635, 5645-6, 5657, 5666-8.)

(4) We have already set forth (Point I, pp. 19-23, *supra*) the demands of Sergius and Alexy in the name of the Patriarchate that the clergy and parishes in America

must, on pain of excommunication, give written pledges "of the fullest loyalty to the Russian Power", and of "complete abstention from attacks on the Soviet Power", as "not a political but an *ecclesiastical* condition".

We have also already set forth (pp. 10, 11, *supra*), the supposed decree of the helpless Tikhon, obviously dictated by the Communist Government, purporting to depose Archbishop Platon without trial on unspecified charges that *in America* he "has engaged in public acts of Counter-Revolution directed against the Soviet Power".

In short, the Soviet Power was openly using the Patriarchal regime to threaten with *ecclesiastical punishment* all American ecclesiastics lacking in proof of "fullest loyalty" to itself.

(5) By its Finding 29 the Trial Court itself recognized and accepted the torrent of unbroken documentary proof presented at this trial that (1547, 1552):

> "29. Since World War II, the Moscow Patriarchate in its official publication, The Journal of Moscow Patriarchate, and elsewhere, has periodically published and disseminated in Russia and throughout the world, including the United States, the pronouncements of its top hierarchs, including Patriarch Alexey and Metropolitan Nicholai, which have followed and supported the Soviet line in international affairs, and have been denunciatory and defamatory of the United States Government and its people and of the allies of the United States."
>
> "34. The Journal of the Moscow Patriarchate continues to be sent to St. Nicholas Cathedral."

These Journals bore the official insignia and "imprimatur of the official church" in Moscow (3032). Their circulation in America was assisted by the Patriarchal staff in the Cathedral (3807-10, 4213-21).

Neither St. Nicholas Cathedral nor Orthodox parishes in America were ever intended in the name of religion or of any religious trust to submit their administration or edifices as sluiceways for flooding the United States with such subversive propaganda, the more deadly because of the ecclesiastical assistance to the Kremlin's political objectives at home and abroad. [See examples, pp. 33-38, *post.*]

The Kremlin could have no more insidious transmission belt than one operated in the name and by command of Ecclesiastical Authority.

(6) Similarly, also recognizing and accepting the uncontradicted proof of the official actions of the United States Government concerning these subversive activities of the Moscow ecclesiastical regime in this country, the Trial Court found (1550-1):

> "33. The Executive Department of the United States Government has on occasions excluded from the mails and the customs various issues of the Journal of the Moscow Patriarchs on the ground that they constituted political propaganda in accordance with the opinion of the Attorney General of the United States of December 10, 1949 (39 Op. Atty. Gen. 535)." (See 7 N Y 2d 191, 213.)

(7) The defendant Kreshik, "Dean" of the Cathedral, testified that these monthly Patriarchate Journals were disseminated "not only in the exarchate, but I understand that members of the other churches here in the United States receive them and are on the mailing list" (3807).

He also testified that he had been receiving some for "five, six years" (3810); and that, when he was in Moscow in November, 1956, the Patriarchate's American mailing list for its Journal, was, with the assistance of himself and his companions, revised and brought up to date as to

addresses, so that dissemination in the United States would be bettered (3808-9). "The different members of the delegation, knowing of a transfer of a priest, did change the address" (3809).

Similarly, the Rev. Joseph Dzvonchik, who at the Cathedral was "Dean" from 1948 to 1955 and thereafter secretary of the "Exarchate" of the defendant Boris Vik, testified on cross examination that the Patriarchate Journals at first came to the Cathedral in bundles except during the times of their interception by the United States Customs Department, and that thereafter the Journals were sent by personal mailings directed to priests in America, whether of the Patriarchal regime in Moscow or not (4213-21); and that (4217):

> "But lately, after our visit (to Moscow) in 1948 —no, in 1955, I visited the offices of the editorial staff there and we looked over the addresses and we corrected the addresses there, and we received individual numbers of the Patriarchal Journal."

The change from sending the Journals in bundles to sending them from Moscow by personal mailings to individuals, at addresses kept current by the Patriarchate's clerics in the Cathedral, promoted wider circulation in America and avoided interception by the Customs Department.

(8) But exclusion from the mails and the customs has not been the only defensive action taken by the United States Government against the subversive activities of the Kremlin in the disguise of ecclesiastical vestments.

On December 12, 1955, the United States Department of State released "for the press" a document (Ex. 26-D, 5059-5085) which flatly declared (5082):

> "The Government of the United States can not permit Archbishop Boris to perform the function of Exarch of the Russian Orthodox Church in America." (See 7 N Y 2d 191, 213.)

Yet this is precisely what, as the Trial Court itself found, the defendant Archbishop Boris Vik has been doing *from Moscow*. To quote Findings 35 and 42 as to these defendants (1553, 1558):

> "35. Boris Vik, a Soviet national residing in Russia, was and still is the appointee of the Moscow Patriarch as the Archbishop of the Archdiocese of the Moscow Patriarchate in North America and the Aleutian Islands, and as Exarch of the Moscow Patriarchate in North America."

> "42. Bishop Dionisi (Diachenko) and the clergy of the Archdiocese and Exarchate of the Moscow Patriarchate in North America are subject to the direction of Boris Vik as Archbishop and Exarch."

(9) There is no question as to authenticity, contents and malignant viciousness of these continous, world-wide anti-American outpourings of the Moscow Patriarchate through its official Journals and other media oral and printed.

The Trial Court itself accepted in evidence and embodied in Finding 29 (1548) Exhibits 1, 22, 47-D, samples from which occupy some 154 pages of the Record on Appeal *and which cover the period from 1948 to 1957*,—the latest ten years of the Cold War down to the time of trial (pp. 997-1146, 1312-4).

Some are so vicious in their language and mendacity as to be almost unprintable. They far outstrip the Kremlin's own vituperative and threatening propaganda.

Their design and effect are to arm the Kremlin's political missiles with ecclesiastical warheads. They throw with the ecclesiastical hand the same incendiaries which the Kremlin throws with the secular hand. The common purpose is to set the world on fire against the United States. They are intended and concerted international arson

wherever around the globe the Communist Dictatorship plots for conflagration.

"China", "Korea", "Japan", "Viet-Nam", "Greece", "Indonesia", "Malaya", "Hungary", "Western Germany", "Israel", "Egypt", "the Vatican" are all expressly covered in the Patriarchate's attacks upon the United States and the Free World and in typical Communist cliches and diatribes.

The Patriarch's universal summons is for "the indignation and anger of millions of people in all countries of the world who are raising their voices against the American imperialist man-haters",—the United States as the "fornicatrix of the resurrected Babylon", "The Washington Cain", "the beast of the Apocalypse", "the great blasphemy", "the contemporary blood-thirsty Baal", "the overseas octopus", "this shameless nakedness", "the rascal" organizer of "systematic cannibalistic destruction", "these civilized savages", the practicers of "mass rape", "the hypocrits", "the black world", "merchants of death", "American neofascists", "the servants of the powers of darkness," etc.

In sum, by the Patriarch himself and by the Patriarchate's official publications and pronouncements, the United States is held up to the world and around the world and to its own people as the Anti-Christ of the Apocalypse, to be overthrown at Armageddon and cast into the lake of fire!

On the other hand, Stalin and Communism receive from Alexy himself the language of prostrate worship. "Glory to the great Stalin!" (Ex. 22-D, pp. 86, 282-7, thereof). "Wise God-appointed leader." (Ex. 20-D, 5038-42; Ex. 2-D, pp. 107-8 thereof; Ex. 17-D, 5019.)

(10) Nor are these mere individual or personal expressions.

On the contrary, they expressly are official, ecclesiastical pronouncements, in the nature of encyclicals, declared by

Patriarch Alexy himself to be the Voice of "the Russian Orthodox Church, in my person and that of the Most Holy Synod", and to express, as regards "the struggle against these (American) crimes", "the obligatory and sacred duty of every religious person precisely because of his faith" (4498; Ex. 22-D, p. 30). "On behalf of the Russian Orthodox Church I" (Alexy) (4802). "From the Patriarch and the Most Holy Synod" (4751). "The Most Holy Patriarch of Moscow and All Russia, Alexy" (4721). "The great blasphemy from the Christian point of view is the fact that these (American) people call themselves Christians" (4611-2)

Consistently, when the tyrant died, these pronouncements had apex in the Patriarchate Journal of March, 1953, distributed in America and world-wide through the Patriarchate's mailing list. That Journal carried a full-page portrait of Stalin, a deifying eulogy of this butcher of the Church and archatheist, and the following (3421-3; Ex. 49-D, 5425):

> "Long live the great all-conquering teachings of Marx, Engels, Lenin and Stalin! Long live the great Communist Party of the Soviet Union!"

(11) Typical of the deadly subversive purpose of these Patriarchal pronouncements and dissemination is the following from the outrageous and dastardly tirade, obviously parroting the Kremlin, uttered by Metropolitan Nicholai as the proclaimed spokesman of the Patriarch at the "First Session of the World Council on Peace", held under the auspices of the Stalin Dictatorship in East Berlin on February 23, 1951,—a tirade designed to subvert our military effort in Korea and disseminated in the Patriarchate Journal world-wide and through St. Nicholas Cathedral and the Patriarchate's American mailing list (4621-7):

"From the first day of the lawless aggression the American neofascists began a systematic cannibalistic destruction of the 'lower' Korean race.

What do we see?

Cynically violated standards not only of international rights, but of human morals. Executions without trial and inquisitions, secret and public. Dreadful tortures of victims: the cutting off of ears and noses, breasts, putting out of eyes, the breaking of arms and legs, the crucifixion of patriots, the burial alive in communal graves of women with children at their breasts, etc. The rebirth of the customs of savages—the scalping of Korean patriots for 'souvenirs'.

For the purpose of annihilating the population, the American criminals first of all fanatically killed the political prisoners (from 200,000 to 400,000 persons), forcing them first to dig their own graves; they threw the bodies of patriots [who had been] hung, shot or who died from typhus into a precipice and, to conceal the traces, blew up a cliff above it.

The barbaric bombings of peaceful cities and centers of population were directed exclusively toward the annihilation of the civil population. • • •

These civilized savages arranged shooting matches with living targets, binding peasants to posts with barbed wire and shooting each of them over the heart of the target. Reviving the customs of the young-fascists, young-yankees photographed these scenes for their family albums and sent them home to their fiances and wives.

These representatives of the 'higher' race practised and practise mass rape of the women and young girls of Korea, rounding them up from surrounding towns, making them drunk on gin and raping them. Not limited to outrages, the miserable victims were driven, in places, into tunnels, shot by machine-guns and buried under the debris of blown up cliffs.

> Often one can see on the roads of Korea the still warm corpse of a mother and a crying child at her breast. Cases are known when children, born in prison, were trampled by the soldiers' boots in front of the mother, and then the mother was killed. • • •
>
> American scientists and doctors, under the guise of giving medical assistance, test the newest vaccines and chemical preparations on the prisoners. Every night there are executions in the ravines surrounding the camps. To be destroyed in the first order are the intelligentsia of the Korean people: doctors, teachers, engineers, technicians, agriculturists."

Of Metropolitan Nicolai, the Patriarch's official disseminator of these foul mendacities, the Court of Appeals has said that he is "second in power to Alexei and considered his probable successor," and that (7 N Y 2d 191, 213):

> "While it is not and cannot be in any way dispositive of this appeal, being dehors the record, it may not be amiss at this point to note that, in testimony on May 5, 1959 before the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, Peter S. Deriabian, a former officer of the NKVD, later known as the Ministry of State Security of the Soviet Government, stated that most of the priests of the church in Russia were agents of the secret police, that the seminarians were systematically recruited for this service, and that Metropolitan Nicholai himself is such an agent of the State security apparatus."

(12) The Kremlin has made no concealment of its lethal purpose as regards the United States, which is explicit and implicit in Communist doctrine since Marx. Krushchev recently voiced it again in his notorious boast that "We will bury you."

Patriarch Alexy also voiced it in ecclesastical verbalism when in his official Encyclical "In Defense of Peace,"

published in the Patriarchate Journal of April, 1952, he pronounced *ex cathedra* this curse upon the United States (4753):

> "Let us hope that God will cover with shame the contemporary blood-thirsty Baal, trying to entangle the whole world in its net, that the terrible hand of Providence will re-establish the insulted truth."

(13) These official pronouncements and disseminations of the Patriarchate are cogent parts of the proof upon which the Court of Appeals based its finding that "no essential change has occurred in the Moscow Patriarchate since 1924 • • • which would now vitiate or impair the declaration of autonomy then validly made" (7 N Y 2d 191, 210).

(14) The petition (62a) refers to these "attacks on the United States (which we rightly resent)". *But who are the "we"?*

The petitioners themselves (with the exception of Boris Vik) testified at the trial. So did several associate clerical witnesses whom they called. *Not one of them expressed dissent from or resentment at these "attacks on the United States", proven abundantly during the plaintiff's case.*

Similarly silent was the defendant Boris Vik, the Patriarchal "Exarch".

Indeed, the defendant Kreshik and his associate Dzvonick, successive "Deans" of the Cathedral, admitted assisting in the dissemination of these "attacks on the United States" by participating in keeping the Patriarchate's American mailing list up to date (3807-10, 4217-9). [See pp. 31, 32 *supra*.]

We must assume, therefore, that the "*we*" means the petitioners' subscribing counsel—American citizens.

If they now "rightly resent", how much more were the American constituency of the American Metropolitanate

entitled to "rightly resent" these "attacks on the United States" and these Patriarchal uses of American clergy, temporalities and Cathedral for the dissemination of such infamous attacks?

In short, the designs of the Soviet Power could not be better served than by a Patriarchate which parrots that Power's world-wide attacks upon the United States and its people and which, on the other hand, demands of the American clergy and their constituency the acquiescence and alliance of silence.

The over-all pattern transcends "resentment." It is deadly dangerous.

What, other than administrative autonomy, can be effectual for protection and self-preservation?

(15) The Trial Court also accepted and embodied in its Findings of Fact 11, 12, 13, 14 and 14(a), the laws and regulations whereby the Soviet Government has shackled the Patriarchate, so that it exists and functions only by revocable sufference of the atheistic Dictatorship and within a spider's web of restrictions and surveillance and on condition of subservience (1528-1531).

These constitutional, civil and criminal mandates are in evidence (Exs. 27-D, 28-D, 29-D, 30-D, 31-D, 32-D, 38-D, 39-D, 40-D, 41-D). See also the testimony of Dr. Vladimir Gsovski, whose exceptional qualifications are beyond challenge (2506-2641, 2821-3012); and the testimony of Professor George P. Fedotov (U. S. pp. 40-58). The Soviet Ministry of Justice officially compiled them in 1949 as still in force (5264-8; 2892, Ex. 41-D, 3008-3011).

The Soviet Constitution of 1936, sec. 124, provides (5087):

> "To insure for the citizens freedom of conscience, the Church in the U. S. S. R. is separated from the State and the School from the Church. Freedom of

practice of religious cults and freedom of anti-religious propaganda is recognized for all citizens."

The Soviet Government's own definition of "practice of religious cults" is officially stated as [illegible] in the 1948 Soviet Encyclopedia (Ex. 28-D, 5088-9):

"The Soviet State proceeds from the proposition that the business of the church consists only of the performance of the cult. Any kind of activities of a propagandistic, moralizing or educative nature (on the scale exceeding beyond a definite religious community) should not belong to the church as a union of believers created and existing only for the performance of the cult."

The Soviet Government works this so-called "separation" as a one-way street. As frankly avowed in the publication of the Central Institute for Anti-religious Correspondence Courses, printed by the Soviet Government Printing Office (Ex. 32-D, 5232, 5235):

"*It is necessary to emphasize the Soviet Decree concerning the Separation of Church from State and the School from the Church; was from the beginning directed against religion.* In the question of religion, the Soviet Government never carried a double-dealing policy of equal cooperation with religion and atheism. It would be wrong to represent the whole matter as if our government kept away from the problem of religion, washed its hands and left the matter to its natural course. . . .

If the capitalistic separation of Church and State leads to the free and highest development of religion, the Soviet separation of Church and State leads to the free and final death of religion." (Emphasis ours.)

See also *Vishinsky*, "Soviet Constitutional Law," 1938 (Ex. 40-D, 2832-2844, 5258-5263).

The multitudinous restrictive provisions of the basic licensing statute are almost unbelievable in their range, minutiæ and enchainment (Ex. 29-D, 5090-5155). By way of typical illustration we quote the following (5101-4):

> "14. The governmental agency registering the religious associations may exclude any individual member from the executive body of a religious society or group of believers."
>
> "17. Religious associations may not (a) create mutual credit societies, co-operatives or commercial enterprises, or in general use the property at their disposal for other than religious purposes; (b) give material assistance to their members; (c) organize for children, young people and women special prayer or other meetings, or, generally, meetings, groups, circles or departments for biblical or literary study, sewing, working or the teaching of religion, and the like, or organize excursions, children's playgrounds, public libraries or reading-rooms, or organize sanatoria and medical assistance.
>
> Only books necessary for the purposes of the cult may be kept in the buildings and premises used for worship."
>
> "18. The teaching of any form of religious belief in State, public and private teaching and educational establishments shall be prohibited. Such teaching may be permitted exclusively at special theological courses organized by citizens of the U.S.S.R. by special permission of the Commissariat for Internal Affairs of the R.S.F.S.R. and, in the territories of the Autonomous Republics, by permission of the Central Executive Committee of the Autonomous Republic concerned."

This detailed basic statute is accompanied with even more detailed and restrictive Instructions and Regulations which are in evidence as Ex. 30-D; and for their enforce-

ment there are certain criminal statutes in evidence as Ex. 31-D ("with amendments as of October 1, 1953").

Dr. Vladimir Gsovski, the outstanding expert in this country on Soviet law (2506 *et seq.*), testified that the effect of all this legislation is to "restrict a church to performance of rituals without missionary work, without charity, without any dissemination of religious idea, without instruction in religion, without training of young people in religion" (2531).

These stringently restrictive statutes are administered by the "Council on Affairs of the Russian Orthodox Church" which was established simultaneously with Stalin's permission for the re-establishment of the Moscow Patriarchate (Ex. 19-D, 5035-7; Ex. 2-D, pp. 92-3, Ex. 54-D, 5523-4) and which is headed by Major General G. G. Karpov of the MVD,—the dread secret police (2779; Ex. 18-D, 5032-4; Ex. 2-D, pp. 92-3; Ex. 54-D, 5524-7).

A Church which perforce must operate under this concept of sufferance by an atheistic Communist Dictatorship, which denies and wars upon all its faith, is not and cannot be free or other than "a tool." (*Toomey* vs. *Farley*, 2 N Y 2d 71, 83.) It must continuously pay the price in subservience, and must require all under its sway to do likewise. What the Dictatorship tolerates today it may restrict or withdraw tomorrow. (7 N Y 2d 191, 210.)

How far, in Russia, the atheistic cat will let the religious mouse run, is idle speculation. The world has seen in Hungary, as the testimony in this case shockingly records (2647, *et seq.*), what Communism's claws will do to a Church which will not render unto Caesar the things of God and which will not surrender its own or mankind's birthright of freedom.

(16) The policy and course of the Soviet State are, through its mastership over the Church in Russia, to extend

and consolidate like mastership over the Church abroad in America and elsewhere.

The proof is too overwhelming to be denied; and the Court of Appeals so found and held (7 N Y 2d 191, 210-2, 214-5).

Dr. George N. Shuster, the President of Hunter College, in his 1954 book "Religion Behind the Iron Curtain", written with the experience of his missions in Europe for the United States Government, states the stark and incontestable fact (p. 20):

> "The Soviet objective is to reduce religious organizations outside of Russia to the status of the Orthodox Church at home. The formula is always and everywhere the same, though it may be applied with greater or less rigor."

Surely neither the American constituency nor this plaintiff nor the security of the United States must yield to any such objective.

See also Dr. Vladimir Gsovski (3006-7); David J. Dallin, "The Changing World of Soviet Russia", 1956, (Ex. 54-D; 5507, 5533); Dr. John Shelton Curtiss, Professor of History at Duke University, "The Russian Church and the Soviet State, 1917-1950" (3220-1, 3157-3160; Ex. A-D, pp. 317, 325); Dr. N. S. Timasheff, Professor of Sociology at Fordham University, "Religion in Russia 1941-1950" (3150-3); Dr. Matthew Spinka, Professor of Church History in Hartford Theological Seminary, "The Church in Soviet Russia," 1956 (3191-2; Ex. 2-D, p. 153); John Gunther, "Inside Russia Today", 1958, (pp. 336-7); Harry Schwartz, Russian expert of the New York Times (3577-8, 3598-9); J. Edgar Hoover, "Masters of Deceit", p. 321; Dr. Timasheff, "The Anti-Religious Campaign in Soviet Russia," 1955, Ex. 55-D, 5542; Ambassador Walter Bedell

Smith, "My Three Years in Moscow," and Anne O'Hare McCormick, both quoted in 302 N. Y. 1, 33 footnote.

Summary.

The decision of the Court of Appeals is a decision of the issue of state law which had been reserved in the prior decisions.

For the reasons stated in Points I and II, *supra*, the Court of Appeals' decision of *that issue* rests, we submit, on an adequate non-federal basis, and therefore cannot be here for review [Rule 16(b).]

But, even if it were, we also submit that the decision rests on a sound and adequate basis.

See also *Romanian Orthodox Missionary Episcopate of America* v. *Trutza*, 120 F. Supp. 183; aff'd 205 F. 2d 107; cert. den. 346 U. S. 915;—discussed by the Court of Appeals, 7 N Y 2d 191, 206-9, 217-8.

Conclusion.

The petition should be denied, with costs.

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